IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JON SUTTON, Plaintiff/Appellee, v. BEATRICE FLORES, Defendant/Appellant.	2 CA-CV 2006-0204 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. SP-20010623

Honorable Frederic J. Dardis, Judge Pro Tempore

REVERSED AND REMANDED

Robert L. Barrasso
Tucson
Attorney for Plaintiff/Appellee

J. L. Machado, P.C.
By Joe L. Machado
Tucson
Attorney for Defendant/Appellant

B R A M M E R, Judge.

¶1 Appellant Beatrice Flores appeals from the trial court's denial of her motion to vacate its order establishing appellee Jon Sutton's paternity of her child, J., and awarding Sutton sole legal custody of J. Flores argues the trial court erred by finding that service of the summons and complaint against her had been sufficient and that it could therefore properly exercise personal jurisdiction over her. We reverse the order and remand the case to the trial court with directions to grant Flores's motion to vacate for lack of personal jurisdiction.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the plaintiff when addressing whether a court's exercise of personal jurisdiction is proper. *See Rollin v. William V. Frankel & Co.*, 196 Ariz. 350, ¶ 5, 996 P.2d 1254, 1256 (App. 2000). In April 2001, Sutton filed a "paternity complaint," requesting the trial court to enter an order to show cause against Flores, "declar[e] Jon Sutton the biological father of the minor child, [J.]," "grant temporary joint custody to the parties," and determine "reasonable child support." After being unable to serve Flores personally, the process server reported she had been told Flores had traveled to Puerto Penasco in Sonora, Mexico. Sutton then filed a motion requesting permission to utilize alternative service pursuant to Rule 4.1(m), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, alleging Flores was "hiding from service." The trial court granted the motion, ordering Flores could be served "by regular mail and by certified mail, return receipt requested, if permitted under

Rule 4.2(i)[, Ariz. R. Civ. P., 16 A.R.S., Pt. 1,]" sent to her parents' address in Puerto Penasco.[1]

¶3 Sutton's attorney then filed an affidavit stating he had sent the required documents to Flores's parents' address "by regular and certified mail," and "[t]he receipt for the certified mail ha[d] not been returned, nor ha[d] the regular mail been returned as undelivered." At a September 7, 2001, hearing, the court "assume[d] jurisdiction for the purpose of paternity, custody, visitation and child support" and ordered, inter alia, that Sutton "is the father of [J.]" and shall have "sole legal custody" of J. The trial court entered final judgment on November 1, 2001.

¶4 Flores remained in Mexico with J. until March 2006, when she returned to Arizona with J. to reconcile with Sutton. The three lived together until June. At that time, Sutton took J. and traveled to Australia, "where he [was] in the process of setting up a business," leaving Flores in Tucson. After contacting the Mexican consulate, which hired her attorney, Flores filed a motion to vacate the November 2001 judgment pursuant to Rule 60(c)(4), Ariz. R. Civ. P., 16 A.R.S., Pt. 2, arguing the order establishing paternity and awarding custody of J. to Sutton was "void for lack of personal jurisdiction" over Flores because Sutton had "never effectuated service of process upon [her]." At a September 12 hearing, the trial court determined "the original service on [Flores] was appropriate" and noted "[t]he fact that no return receipt was filed is not fatal to service since she was also

[1]We analyze the issues before us under Arizona's Rules of Civil Procedure rather than the recently adopted Rules of Family Law Procedure because this action was filed before the new rules became effective in January 2006. *See* Ariz. R. Fam. Law P. 1, 17B A.R.S.

noticed by regular mail." The court denied Flores's motion to set aside the order "as it applies to Paternity" but granted it as to custody and visitation because "the award of sole custody to [Sutton] . . . was not originally pled nor requested." The court also ordered the parties to appear at a hearing on September 21 "to determine the issues of custody and parenting time as well as child support." After that hearing, the court reiterated that Flores had been properly served, granted Sutton "temporary sole legal custody of [J.]," and gave Flores "temporary supervised parenting time." This appeal followed.

Discussion

¶5 Flores asserts the trial court erred in denying her motion to vacate the September 7, 2001, order finding it could properly exercise personal jurisdiction over her, establishing Sutton's paternity of J., and awarding Sutton sole legal custody of J. A party may request relief from a void judgment under Rule 60(c)(4), Ariz. R. Civ. P. "Generally, we will not set aside a judgment under Rule 60(c) unless a clear abuse of the trial court's discretion is shown." *R.A.J. v. L.B.V.*, 169 Ariz. 92, 94, 817 P.2d 37, 39 (App. 1991). "However, we independently review the jurisdiction of the trial court as an issue of law." *Id.; see also Rollin*, 196 Ariz. 350, ¶ 5, 996 P.2d at 1256. "Once the existence of personal jurisdiction is challenged, the party asserting jurisdiction has the burden of establishing it." *Kadota v. Hosogai*, 125 Ariz. 131, 133-34, 608 P.2d 68, 70-71 (App. 1980). "Furthermore, the law is clear that a judgment is void if the trial court did not have jurisdiction because of a lack of proper service." *Id.* at 134, 608 P.2d at 71.

¶6 Sutton asserts this appeal is "moot" because the trial court set aside the September 2001 custody order and granted Flores "full relief" by holding "a de novo trial" and because Flores "does not contest paternity." This argument is difficult to understand; by finding service had been proper, the trial court specifically denied Flores's motion to vacate the order on the ground the court lacked personal jurisdiction over her. The court, while vacating its custody determination, did not vacate that portion of the order determining Sutton's paternity. Moreover, that Flores has not specifically argued Sutton is not J.'s father is irrelevant. If the court lacked the authority to determine J.'s paternity because service of process on Flores had been insufficient, that order is void regardless of whether it is otherwise correct or if the underlying facts are undisputed. *See id.*

¶7 Nor did Flores voluntarily submit herself to Arizona jurisdiction by appearing at the September 21, 2006, hearing on custody, visitation, and child support.[2] Given the trial court's rejection of her argument that service was improper, we cannot say she waived her right to personal service by appearing at the custody hearing—if her arguments concerning personal service were rejected on appeal she would have lost her only opportunity to argue the custody issues on their merits. *Cf. Nat'l Homes Corp. v. Totem Mobile Home Sales, Inc.*, 140 Ariz. 434, 437, 682 P.2d 439, 442 (App. 1984) ("We have no problem in holding . . . that a defendant who has obtained an adverse ruling on its jurisdictional defense has not waived

[2]Although Sutton does not raise this argument on appeal, we address it because we review issues of personal jurisdiction de novo, *see R.A.J. v. L.B.V.*, 169 Ariz. 92, 94, 817 P.2d 37, 39 (App. 1991), and because we prefer to resolve cases on their merits, *Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966).

that defense on appeal even though he proceeds to trial on the merits and a judgment has been entered against him. In such a case, the defendant is under a compulsion to defend.") (citation omitted); Ariz. R. Civ. P. 12(b), 16 A.R.S., Pt. 1 ("No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.").

¶8 Although "[i]t is widely recognized . . . that a non-resident party may waive objection to the absence of personal jurisdiction by seeking affirmative relief from the court," *Taylor v. Jarrett*, 191 Ariz. 550, ¶ 10, 959 P.2d 807, 809 (App. 1998), Flores has not done so. She requested only that the trial court's order be vacated due to a lack of personal jurisdiction and because the trial court granted Sutton relief he did not request—sole legal custody of J. Therefore, Flores did not waive her personal jurisdiction defense.

¶9 Flores does not argue the trial court erred by permitting Sutton to pursue alternative service under Rule 4.1(m). That rule permits a trial court to allow "an alternate or substitute form of service" "[i]f service by one of the means set forth in [Rule 4.1] proves impracticable." Ariz. R. Civ. P. 4.1(m). The affidavit of the process server who attempted to serve Flores in Tucson stated she had been told "there [was] no way of getting ahold of [Flores] because she's in Puerto Penasco." Given this information, and in the absence of any argument to the contrary, we conclude Sutton's single attempt to effect personal service was sufficient proof personal service on Flores in Arizona was impracticable. *See, e.g., Rouzaud v. Marek*, 166 Ariz. 375, 380, 802 P.2d 1074, 1079 (App. 1990) ("Clearly, a showing of due

diligence in trying to serve a summons personally is required before use of substituted service will be allowed.").

¶10 Rule 4.1(m) requires the serving party to make "reasonable efforts . . . to assure that actual notice of the commencement of the action is provided to the person to be served." Substituted service, therefore, must meet state and federal due process requirements. *Rouzaud*, 166 Ariz. at 380, 802 P.2d at 1079. "[D]ue process requires merely the giving of 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id., quoting Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950). "[T]he notice and opportunity for hearing sufficient to satisfy due process will vary with the nature of the case." *Id.* And "[w]hat is required is that service of process be substantially likely to cause actual notice to be received." *Id.* We agree with Flores that the procedure the trial court permitted here does not meet the requirements of due process.[3]

¶11 Other than Sutton's unsupported assertion in his motion for alternative service that Flores "occasionally . . . travels to Mexico to be with her parents and is always in communication with her parents," there is nothing in the record that suggests documents

---

[3]Although Flores does not raise this issue, it appears Sutton did not comply with the requirements of Rule 4.1(m), Ariz. R. Civ. P., 16 A.R.S., Pt. 1. That rule requires that, for alternative service to be proper, "the summons and the pleading to be served, as well as any order of the court authorizing an alternative method of service, shall be mailed to the last known business or residence address of the person to be served." *Id.* Nothing in the record suggests Sutton did so. Because Sutton's service of process was otherwise insufficient, however, we need not decide whether this apparent failure to adhere to Rule 4.1(m) is fatal to the court's exercise of personal jurisdiction over Flores.

mailed to Flores's parents' address would find their way into her possession. In the absence of such evidence, it was not reasonable to assume that mailing documents to Flores's parents' address rendered it substantially likely Flores would be apprised of the pendency of the action against her and afford her an opportunity to defend against it. *See id.*; *see also Kadota*, 125 Ariz. at 133-34, 608 P.2d at 70-71 (party asserting jurisdiction has burden of establishing it). Accordingly, we conclude the procedure the trial court permitted did not meet the requirements of due process.

¶12 Sutton cites no authority suggesting the service of process utilized in this case meets the requirements of due process.[4] Nor do we find any Arizona authority compelling that conclusion. In *Rouzaud*, under arguably similar facts, Division One of this court determined service on a defendant who had left the country to avoid service could be achieved by serving her mother. 166 Ariz. at 381, 802 P.2d at 1080. In that case, however, there was significant evidence the defendant "was willfully evading service." *Id.* The plaintiff, seeking an "order to show cause to hold [the defendant] in contempt of court for failing to abide by the trial court's [child custody] orders," alleged that, despite "repeated attempts to contact" the defendant, she had "denied him any visitation . . . and . . . refus[ed] to inform him where she and the child were residing." *Id.* at 377, 702 P.2d at 1076. Additionally, the plaintiff had received a letter from the defendant with a West German

[4]Indeed, Sutton's answering brief cites two cases, only one of which is relevant to service of process. He cites *Milliken v. Meyer*, 311 U.S. 457, 61 S. Ct. 339 (1940), for the proposition that service of process must be "reasonably calculated to give [Flores] actual notice and an opportunity to be heard." Nor does his statement of facts contain citations to the record on appeal. *See* Ariz. R. Civ. App. P. 13(a)(6), (b), 17B A.R.S.

postmark but no return address. *Id.* And an attorney representing that defendant in "other related proceedings," *id.* at 380, 802 P.2d at 1079, stated at a hearing "that it was his belief [the defendant] was in contact with her parents and that [the defendant's] instructions were forwarded to him through her parents." *Id.* at 381, 802 P.2d at 1080.

¶13 Here, in contrast, the only evidence Flores was evading service was the possibility that she had traveled to Mexico and that a process server had, on one occasion, failed to locate her in Arizona. And, unlike in *Rouzaud*, there was no evidence Flores was in regular contact with her parents. Furthermore, the defendant's mother in *Rouzaud* was personally served. *Id.* at 378, 802 P.2d at 1077. Here, the methods Sutton chose to deliver the documents to Flores's parents' address were far less reliable and, as explained below, did not comply with the Arizona Rules of Civil Procedure. Thus, the facts in *Rouzaud*, unlike the facts before us, make clear that service on the defendant's mother there was substantially likely to give the defendant notice of the pending action.

¶14 Authority from other jurisdictions supports our conclusion that sending the documents to Flores's parents' address did not meet due process requirements. For example, in Ohio, service of process at a business address is sufficient only if the party being served has "'a habitual, continuous or highly continual and repeated physical presence at the business address.'" *Money Tree Loan Co. v. William*, 862 N.E.2d 885, 889 (Ohio Ct. App. 2006), *quoting Bell v. Midwestern Educ. Servs.*, 624 N.E.2d 196, 202 (Ohio Ct. App. 1993). Clearly, the possibility Flores might have contact with her parents does not meet this test.

¶15 The Oregon Supreme Court determined personal delivery of a summons to a defendant's parents was insufficient. *Theones v. Tatro*, 529 P.2d 912, 919 (Or. 1974). Although the defendant visited his parents' home "with some regularity," it was not "a center of his home activities." *Id.* Admittedly, unlike here, the plaintiff in *Theones* never attempted to serve the defendant in any other fashion. *Id.* at 919-20. The court in *Theones* noted, however, that the sufficiency of service "must be tested by comparing the probability that defendant will receive actual notice by such service with the probability of his receiving actual notice through other available methods of service which could be employed." *Id.* at 919.

¶16 Additionally, as we have noted, Sutton's service of process did not comply with the controlling Rules of Civil Procedure. Although service of process by regular mail is permitted under Rules 4.1(c) or 4.2(d),[5] it is not adequate to confer personal jurisdiction unless the person so served signs an accompanying waiver of personal service under oath or affirmation and the serving party files that waiver with the court. *See Postal Instant Press, Inc. v. Corral Restaurants, Inc.*, 187 Ariz. 487, 488, 930 P.2d 1001, 1002 (1997); *see also* Ariz. R. Civ. P. 4.1(c)(2); Ariz. R. Civ. P. 4.2(d)(2). By permitting Sutton to serve Flores by regular mail, the trial court adopted a method of service far less reliable than that explicitly

[5]It is not clear from the order permitting alternative service whether the trial court had determined Rule 4.1, which governs process within the state, or Rule 4.2, which governs process outside the state, should apply to Sutton's attempt to serve process on Flores. And the parties dispute whether Flores resided in Mexico during the relevant time. We need not resolve this question, however, because, as we have explained, Sutton's attempts to serve Flores did not meet the requirements of due process.

required by our rules. Even if there was evidence Flores actually resided with her parents,[6] serving her at their residence by regular mail, without more, was insufficient under Arizona's Rules of Civil Procedure.

¶17 Nor was Sutton's attempt to serve Flores by certified mail sufficient. Rule 4.1 does not provide for service by certified mail within the state. Rule 4.2(i) permits service on individuals in a foreign country by various means, including "any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served." Sutton's attorney's affidavit addressing his compliance with the order allowing alternative service did not state the clerk of the court mailed the summons and complaint to Flores at her parents' address. Moreover, that affidavit also stated the return receipt had not been received. Rule 4.2(c) governs service by certified mail outside Arizona and permits service of a person by "any form of mail requiring a signed and returned receipt." Service, however, is not valid unless the serving party "file[s] an affidavit with the court" that includes a copy of the signed and returned receipt. Ariz. R. Civ. P. 4.2(c).

¶18 Because of the conclusions reached above, we need not address Flores's argument that the trial court incorrectly applied the "mailbox rule" to mail sent to her in

[6]Rules 4.1(c) and 4.2(d) require that the notice and request for waiver be "addressed directly to the defendant" in accordance with the rules. Specifically, the documents must be sent to the defendant's "dwelling house or usual place of abode." Ariz. R. Civ. P. 4.1(d). In his motion for alternative service, Sutton did not assert Flores was living with her parents. On appeal, he insists Flores had been "residing in the United States" during the relevant time.

Mexico[7] and, thus, improperly shifted the burden of proof to Flores to prove she had not received the summons.[8] Nor need we, as Flores asks, determine "whether the laws of the Republic of Mexic[o] and/or the laws of the State of Sonora permit service of judicial documents from foreign countries via certified mail."[9] Moreover, Sutton does not argue Mexican law permits service of process by regular mail. *See Kadota*, 125 Ariz. at 133-34, 608 P.2d at 70-71 (party asserting jurisdiction has burden of establishing it); Ariz. R. Civ. P. 4.2(i)(2)(A).

¶19 Before Sutton filed his action, Flores filed a petition on March 28, 2001, requesting an order of protection against Sutton that the Tucson City Court granted the same day. Pursuant to A.R.S. § 13-3602(O), "all papers, together with a certified copy of docket entries or any other record in this action" were transferred to the superior court to be filed

---

[7]Flores refers to the "strong presumption that a letter properly addressed, stamped and deposited in the United States mail will reach the addressee." *State v. Mays*, 96 Ariz. 366, 367-68, 395 P.2d 719, 721 (1964).

[8]In support of this argument, Flores suggests the trial court's finding in its September 21, 2006, ruling that "it was clear to the Court that [Flores] had notice, she knew of the Orders and that she was going to remain in Puerto Penasco, Sonora, Mexico and not obey the Court Order" is an indication the trial court improperly shifted the burden to her to prove she had not received the summons. This finding, however, does not state Flores had actual notice of the summons, but only of the September 7, 2001, order. Thus, it is irrelevant to whether service of process was sufficient.

[9]Flores also asks us to determine whether "Article 10 of The Hague Convention" permits "service of process by mail." She refers to Rule 4.2(i)(1), which permits service on an individual in a foreign country "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." Again, because we conclude service was insufficient, we need not reach this question.

under this action. The transfer order was signed September 6, 2001, and stated the file was transferred to the superior court the following day. The documents were filed in superior court on September 17, 2001, ten days after the trial court issued its order finding service of process on Flores had been proper.

¶20 Sutton argues that, because the "Transfer Order was mailed to [Flores] at her last known address[,] . . . she had notice that there was a paternity action pending." We disagree. The transfer did not occur until the same day the trial court determined it could exercise personal jurisdiction over Flores; any notice that transfer order may have provided was untimely. Moreover, even if the transfer order were sufficient notice, notice alone is insufficient for a trial court to exercise personal jurisdiction absent proper service of process. *See Kadota*, 125 Ariz. at 137, 608 P.2d at 74 ("The fact that the appellant may have had actual notice in this case does not excuse appellee's failure to comply with the applicable statutes."). Furthermore, Sutton cites no authority, and we find none, suggesting Flores's initiation in Tucson City Court of an action transferred by operation of statute to the superior court constituted an appearance in the latter court that would waive her personal jurisdiction defense and cure the prior insufficient service of process. The city court had already issued the protection order Flores sought; she was not seeking further relief from the superior court. *See Taylor*, 191 Ariz. 550, ¶ 10, 959 P.2d at 809.

¶21 For the reasons stated above, we conclude Flores was not properly served; therefore, the trial court lacked personal jurisdiction over her. *See Kadota*, 125 Ariz. at 134, 608 P.2d at 71. Consequently, its order establishing Sutton's paternity and awarding him sole

legal custody of J. is void. *Id.* We reverse the trial court's denial of Flores's motion to vacate that order and remand the case with directions to the trial court to grant Flores's motion.

_____
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
PHILIP G. ESPINOSA, Judge